



July 19, 2013

Mr. Dorval R. Carter, Jr.
Chief Counsel
Federal Transit Administration
East Building
1200 New Jersey Avenue SE
Washington, DC 20590

RE: DART's Park-and-Ride Service for the Iowa State Fair

Dear Chief Counsel Carter:

For the reasons outlined in the enclosed Des Moines Area Regional Transit Authority's response to Windstar Lines, Inc.'s Advisory Opinion and Cease and Desist Request, Des Moines Area Regional Transit Authority (DART) respectfully requests that you deny the request for a cease-and-desist order filed in your office on July 17, 2013, by Windstar Lines, Inc.

In DART's opinion, Windstar Lines misinterprets the definition of charter service in the federal charter regulations as it relates to DART's operation of transit services to the Iowa State Fair.

In view of the surrounding circumstances, we have made an enormous effort to provide our response to the request filed by Windstar Lines in a timely manner. Please do not hesitate to call me with any questions you may have. We would be glad to provide additional information or clarification, if necessary.

Sincerely,

A handwritten signature in dark ink, appearing to read "Elizabeth Presutti".

Elizabeth Presutti
DART General Manager

Enclosures

Cc: Jeff Greteman, President of Windstar Lines, Inc.
Nancy-Ellen Zusman, Assistant Chief Counsel at FTA
Michelle Hershman, Attorney at FTA

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**DES MOINES AREA REGIONAL TRANSIT AUTHORITY'S RESPONSE TO
WINDSTAR LINES, INC.'S
ADVISORY OPINION AND CEASE AND DESIST REQUEST**

On July 9, 2013, Des Moines Area Regional Transit Authority (DART) provided an inquiry to the Ombudsman for Charter Services at the Federal Transit Administration (FTA) seeking an informal opinion from the FTA (the "Inquiry") regarding transit services DART provides to the Iowa State Fair (the "State Fair"). On Tuesday, July 16, 2013, DART received a copy of a Notice of Charter Service Complaint (the "Complaint") dated July 15, 2013, in which Windstar Lines, Inc. ("Windstar") requested that the FTA Chief Counsel (the "Chief Counsel") conclude DART is providing transit services to the State Fair in violation of the federal charter regulations set forth at 49 C.F.R. Part 604 (generally, the "Charter Regulations"). Subsequently, on July 17, 2013, DART received a copy of an Advisory Opinion and Cease and Desist Request (the "Request") in which Windstar requested that the Chief Counsel issue an advisory opinion finding DART in violation of the Charter Regulations and a cease and desist order to preclude DART from operating its transit service in connection with the State Fair, which will be held August 8-18, 2013.

DART hereby offers this Des Moines Area Regional Transit Authority's Response to Windstar Lines, Inc.'s Advisory Opinion and Cease and Desist Request ("Response") as a point-by-point rebuttal to the information included in the Request as permitted under 49 C.F.R. Part 604.22(c). Based upon communication with the FTA, it is DART's understanding that FTA intends to issue only one decision in connection with the Inquiry, the Complaint and the Request. Accordingly, this Response is intended in support DART's position with respect to the Inquiry, the Complaint, and the Request.

It is DART's position that its expanded operation of fixed Route #1 does not constitute operation of charter service in connection with the State Fair. For the reasons outlined herein, DART opposes the Request and asks that the FTA promptly deny the Request and allow DART to implement its plan to provide expanded fixed route service to the State Fair beginning Thursday, August 8, 2013.

REQUEST FOR EXPEDITED REVIEW

DART further respectfully requests that the FTA undertake an expedited review of this matter in light of the immediacy of the State Fair. DART recognizes the additional burden this request places on FTA, but DART would be most appreciative of receiving expedited review given the time sensitivity at hand.¹

¹ DART, in the course of its research regarding expedited review, discovered that a similar scenario unfolded in Platinum Tours and Travel d/b/a Royal Tours; Docket No. FTA-2007-0023; Advisory Opinion and Cease and Desist Order 09-04. In that case, FTA provided expedited review and stated: "We note that Royal Tours sent FTA a request for an advisory opinion and cease and desist order only six business days before the start of the Minnesota State Fair. Given the fact that Metro Transit needed time to respond to the request and the fact that 49 C.F.R. Part 604 states that "the Chief Counsel shall make every effort to respond to a request for an advisory opinion within ten days of receipt....," we believe the request is not timely. Even so, we considered the merits of the request and made every effort to issue the decision expeditiously."

STANDARD OF REVIEW

Under the Charter Regulations, the Chief Counsel may grant a request for a cease and desist order only if the interested party demonstrates, by a preponderance of the evidence, that the planned provision of charter service by a recipient would violate 49 C.F.R. Part 604. See *49 CFR 604.24*. In determining whether to grant the request for a cease and desist order, the Chief Counsel must consider the specific facts shown in the signed, sworn request for a cease and desist order, applicable statutes, regulations, agreements, and any other information that is relevant to the request. See *id.*

STATEMENT OF FACTS

DART records indicate that it has provided transit services in some manner to patrons of the State Fair since 1982. Over the years, many things have changed, including FTA's regulations regarding charter services in 2008, but DART's provision of transit services to patrons of the State Fair has remained a constant. In 2008, when the FTA amended the Charter Regulations, DART carefully reviewed the new Charter Regulations to ensure continued compliance with the same. In fact, DART discontinued transit service to many local events because it determined such services would constitute a violation of the Charter Regulations. DART was pleased to realize through its review and analysis of the Charter Regulations that it would still be permitted to provide transit services to the State Fair via fixed Route #1. DART's park-and-ride service has become a memorable and much appreciated part of the State Fair experience for thousands of fairgoers.

On July 9, 2013, Elizabeth Presutti, DART's General Manager ("Ms. Presutti"), received a telephone call from Jeff Greteman, Windstar's President ("Mr. Greteman"). During the conversation, Mr. Greteman indicated to Ms. Presutti that Windstar desired to partner with DART to help provide transportation from the park-and-ride locations for the State Fair. Ms. Presutti, in consideration of the immediacy of the State Fair, informed Mr. Greteman that no such arrangement was feasible for this year, but that she would be happy to discuss opportunities to work in conjunction with Windstar in the future. In response, Mr. Greteman informed Ms. Presutti that Windstar would be filing a complaint with the FTA.

On Tuesday, July 16, 2013, DART received a copy of the Complaint. The following day, DART received a copy of the Request, with a correspondence from Mr. Greteman that indicated the FTA had informed him that the Request should be filed with the FTA in lieu of the Complaint. Unbeknownst to Windstar, DART had already submitted the Inquiry to FTA on July 9th seeking a determination from the FTA regarding whether DART's transit service to the State Fair complies with the Charter Regulations.

In the Inquiry, a copy of which is attached hereto as Exhibit A, DART provided a summary of those characteristics of DART's transit service to the State Fair it determined were needed for FTA to render an opinion regarding whether DART's transit service to the State Fair constituted charter service. In addition, prior to formally submitting the Inquiry, on June 19, 2013, DART provided the Contract Between the Des Moines Area Regional Transit Authority and the State of Iowa, Iowa State Fair Regarding Provision of Operating Assistance for DART Services (the "Operating Assistance Contract"), a copy of which is attached hereto as Exhibit B, for review by the FTA.

Other facts deemed relevant to DART's analysis and this Response may be discussed as part of the Analysis section immediately below.

ANALYSIS

A. DART'S REBUTTAL OF WINDSTAR'S ALLEGATIONS IN THE COMPLAINT AND THE REQUEST

The Charter Regulations provide "[a]n advisory opinion may also request that the Chief Counsel issue a cease and desist order, which would be an order to refrain from doing an act which, if done, would be a violation of this part." See 49 C.F.R. Part 604.17. Therefore, in order to secure the requested cease and desist order, Windstar must demonstrate that the transit services provided by DART during the State Fair violate the Charter Regulations. Pursuant to the Charter Regulations, DART, as a recipient of federal funding, is prohibited from engaging in competition with private charter operators to provide "charter services." Therefore, any analysis concerning whether DART is violating the Charter Regulations must begin with a determination that DART is providing charter services.

The Charter Regulations, in Part 604.3(c), define "charter services" as follows:

"Charter service" means, but does not include demand response service to individuals:

(1) Transportation provided by a recipient at the request of a third party for the exclusive use of a bus or van for a negotiated price. The following features may be characteristic of charter service: (i) A third party pays the transit provider a negotiated price for the group; (ii) Any fares charged to individual members of the group are collected by a third party; (iii) The service is not part of the transit provider's regularly scheduled service, or is offered for a limited period of time; or (iv) A third party determines the origin and destination of the trip as well as scheduling; or

(2) Transportation provided by a recipient to the public for events or functions that occur on an irregular basis or for a limited duration and: (i) A premium fare is charged that is greater than the usual or customary fixed route fare; or (ii) The service is paid for in whole or in part by a third party.

Since Windstar failed to specifically state in the Complaint or the Request which of the two prongs of the charter services definition it feels DART satisfies, this analysis will set forth the facts and reasoning to show that DART does not provide charter services under either prong of the definition.

Part 604.3(c)(1) Analysis.

First, DART does not provide transportation to the State Fair at the request of the State Fair or any other third party. DART simply provides a heightened level of service to the State Fair via fixed Route #1, which is the same fixed route that services the State Fair grounds on a year round basis. In addition, DART's transit service does not allow for the exclusive use of State Fair transit service by any other third party. The Charter Regulations, in Part 604.3(h), define "exclusive" as follows: "Exclusive means service that a reasonable person would conclude is intended to exclude members of the general public." Fixed Route #1 is open to the general public on a year-round basis, including at all times during the duration of the State Fair. Finally, there is no negotiated price for DART's transit service to the State Fair—DART's remuneration for the transit service is the fare collected from passengers. In sum, DART does not provide charter services as defined in 49 C.F.R. Part 604.3(h)(1).

Part 604.3(c)(2) Analysis.

The second prong of the charter services definition appears to be the prong of the charter services definition apparently being called into question by Windstar. In the Complaint and the Request, Windstar alleges the following four facts constitute a violation of the Charter Regulations:

1. DART does not offer a regular route that goes by Southeast Polk High School.
2. DART only operates this route for a limited duration (i.e., during the State Fair).
3. DART charges a premium fare for its transit service to the State Fair.
4. The hours of operation for DART's Route #1 are 5:36 a.m. to 6:41 p.m. Monday through Friday and 7:45 a.m. to 5:38 p.m. on Saturday and Sunday year round.

DART's responses to each of the foregoing allegations are provided in order below.

1. DART does not offer a regular route that goes by Southeast Polk High School.

As noted by Windstar, DART's fixed Route #1 service generally does not extend east of NE 56th Street, but during the State Fair DART extends fixed Route #1 to approximately NE 80th Street, which is the site of the Southeast Polk High School park-and-ride location. While DART does alter fixed Route #1 during the State Fair in response to an increase in demand for public transportation, the definition of charter services, and in particular the second prong of said definition, does not provide that altering a fixed route in response to increased demand constitutes charter services.

Recent advisory opinions from the FTA underscore the fact that temporary fixed route alterations do not constitute charter service. For instance, earlier this year, the FTA considered whether similar fixed route alterations by Greater Cleveland Regional Transit Authority (GCRTA) for service to the National Senior Games (NSG), which were being hosted in Greater Cleveland, constituted charter service. GCRTA anticipated an increase in demand for public transportation during the NSG and proposed to meet that demand primarily by increasing service on existing routes and temporarily modifying existing route alignments, service spans, and schedules to better accommodate the NSG participants and spectators who wished to travel to or from those venues serviced by GCRTA. See *FTA Advisory Opinion 13-01 (February 28, 2013)*. The FTA concluded that "[t]emporary extensions of routes for special events are not charter service provided that GCRTA charges its usual and customary fare for the service, the routes and schedules are determined by GCRTA and are made available to the general public, the vehicles operated during these times are open to the general public, and the service is not subsidized by any third parties." *Id.*

Presumably, "usual and customary fare" is used in this instance by FTA to mean "not a premium fare."² The fare DART charges for transit services to the State Fair will be discussed in greater detail below. However, while DART does not charge its usual and customary fare, it is noteworthy that the fare charged to passengers going to the State Fair is not a premium fare. Further, the routes and schedule for fixed Route #1 are determined exclusively by DART and made available to the general public through various means (e.g., DART's website and public relations efforts). Lastly, fixed Route #1 is open to the general public at all times, and DART's service to the State Fair is not subsidized by any third parties.

² In the GCRTA Advisory Opinion, the FTA stated that "temporarily suspended fares on other public transit routes in the Central Business District during the NSG will not violate the charter regulations." See *FTA Advisory Opinion 13-01 (February 28, 2013)*. DART interprets this to mean that a fare that is not suspended but that is less than the usual and customary fare will not violate the Charter Regulations.

2. DART only operates the temporary extension of fixed Route #1 for a limited duration (i.e., during the State Fair).

DART acknowledges that the temporary extension of fixed Route #1 in conjunction with the State Fair constitutes transportation provided by a recipient to the public for an event or function that occurs on an irregular basis or for a limited duration. The FTA has established that transportation service provided to sporting events and other events of limited duration like the State Fair constitute service provided on an irregular basis or for a limited duration. *See Advisory Opinion 08-06 (April 25, 2008)*. *See also 49 C.F.R. Part 604, App. C (b)(19)*.

3. DART charges a premium fare for its transit service to the State Fair.

DART acknowledges that the roundtrip fare for transit services to the State Fair is Two and no/100 Dollars (\$2.00); however, DART flatly denies any allegation or characterization that this \$2.00 roundtrip fare amounts to a premium fare. Any attempt to characterize the stated roundtrip fare as premium fare is unfounded.

DART's standard fare for one-way fixed route service is One and 75/100 Dollars (\$1.75). For example, if a DART passenger wanted to take fixed route service from their home to the shopping mall and back, the total roundtrip cost for DART's transit services would be Three and 50/100 Dollars (\$3.50) (i.e., a \$1.75 fare for each leg of the trip). Accordingly, contrary to Windstar's allegation, by providing transit services to the State Fair from the three park-and-ride locations for a roundtrip fare of \$2.00, DART is actually providing transit services for a reduced fare, not a premium fare. Additionally, DART honors its Half-fare program for seniors, children and persons with disabilities (i.e., \$1.00 roundtrip fare). Furthermore, DART offers a fifty percent (50%) promotional discount to riders with advanced tickets to the Iowa State Fair (i.e., a \$1.00 roundtrip fare). People with advance tickets who also qualify for a Half-fare program would ride for \$0.50 roundtrip fare.

The Charter Regulations, in 49 C.F.R. Part 604, Appendix C(b)(27), provide the following guidance for determining whether DART's \$2.00 roundtrip fare is a premium fare:

Q: What if a transit agency charges a customer an upfront special event fare that includes the outbound and inbound trips, is that a premium fare?

A: It depends. If the transit agency charges the outbound and inbound fares up front, but many customers don't travel both directions, then the fare may be premium. This would not be true generally for park and ride lots, where the customer parks his or her car, and, would most likely use transit to return to the same lot. Under that scenario, the transit agency may collect the regular outbound and inbound fare up front.

Based upon the foregoing guidance, DART's \$2.00 roundtrip fare for the State Fair park-and-ride locations does not constitute a premium fare.

4. The hours of operation for DART's Route #1 are 5:36 a.m. to 6:41 p.m. Monday through Friday and 7:45 a.m. to 5:38 p.m. on Saturday and Sunday year round.

As specifically set forth in the Inquiry, DART acknowledges that DART improves service frequency and span of service on fixed Route #1 to accommodate the spike in demand for service caused by the State Fair.

Recent advisory opinions from the FTA underscore the fact that increases in fixed route service frequency and span of service do not constitute charter service. For instance, as noted above, the FTA considered whether similar increases in service frequency or span of service by GCRTA in connection with the NSG constituted charter service. GCRTA anticipated an increase in demand for public transportation during the NSG and proposed to meet that demand primarily by increasing service on existing routes and temporarily modifying existing route alignments, service spans, and schedules to better accommodate the NSG participants and spectators who wished to travel to or from those venues serviced by GCRTA. See *FTA Advisory Opinion 13-01 (February 28, 2013)*. The FTA concluded that "GCRTA may temporarily operate a route during additional time periods in order to meet increased demand for service provided that GCRTA charges its usual and customary fare for the service, the routes and schedules are determined by GCRTA and are made available to the general public, the vehicles operated during these times are open to the general public, and the service is not subsidized by any third parties." *Id.*

Again, to reiterate, DART presumes "usual and customary fare" is used in this instance by FTA to mean "not a premium fare." While DART does not charge its usual and customary fare, it is noteworthy that the fare charged to passengers going to the State Fair is not a premium fare. Further, the routes and schedule for fixed Route #1 are determined exclusively by DART³ and made available to the general public through various means (e.g., DART's website and public relations efforts). Lastly, fixed Route #1 is open to the general public at all times, and DART's service to the State Fair is not subsidized by any third parties.

In addition to the foregoing four facts alleged by Windstar, Windstar also made an additional allegation in support of its position that DART is in violation of the Charter Regulations. In the Complaint and the Request, Windstar references Ms. Presutti's inability to cite any applicable exemptions DART would qualify for under the Charter Regulations. As set forth in detail in this Response, DART's position remains that it is not providing charter services, and accordingly, no need exists for DART to qualify itself under any of the exemptions listed by Windstar.

In sum, the Request fails to establish by a preponderance of the evidence that the expanded fixed route service planned by DART for the State Fair constitutes charter service under the Charter Regulations. Specifically, the Request mistakenly focuses predominately on the temporary extension of

³ Although DART is required to exclusively determine the routes and schedules for fixed Route #1 in connection with transit service to the State Fair, DART is afforded some flexibility in its scheduling according to a recent FTA Advisory Opinion issued to the Lane Transit District (Eugene, OR). See *FTA Advisory Opinion 13-02 (July 16, 2013)*. Under the terms of the proposed service submitted to the FTA by Lane Transit District, Lane Transit District will provide fixed route service to University of Oregon home football games, and buses will wait at the bus stop until full rather than depart on a regular predetermined schedule. The FTA opined that "[w]hile the proposed service has a couple of characteristics of charter service--service offered for a limited time and service that does not depart on a regular fixed route schedule--FTA determines that the service as described does not meet the definition of charter service. See *id.*

fixed Route #1 and the increase in service frequency and span of service in connection with the same. A cease and desist order is inappropriate as there are no allegations from Windstar that can lead to a conclusion that DART is providing charter services. Even in the event such a conclusion could be reached, Windstar has failed to "distinguish its loss from that of other registered charter providers in the geographic service area" as required by 49 C.F.R. Part 604.22(a)(1). Other private charter operators, not just Windstar, could demonstrate a similar undistinguished "loss."

B. ADDITIONAL SUPPORT FOR THE INQUIRY AND DART'S GENERAL POSITION

As previously noted, based upon communication with the FTA, it is DART's understanding that the FTA intends to issue only one decision in connection with the Inquiry, the Complaint and the Request. In other words, the three proceedings are deemed to have been merged into one. In keeping with this understanding, DART will assume in this section of this Response that Windstar's request for a cease and desist order has been denied.

In DART's view, in order to determine if DART is providing charter service as a result of its transit service to the State Fair, the FTA's interpretation of the second prong of 49 C.F.R. Part 604.3(c) is imperative. The determination DART seeks is whether the State Fair's payment of the operating assistance subsidy to DART under the Operating Assistance Contract constitutes "the service is paid for in whole or in part by a third party" under 49 C.F.R. Part 604.3(c)(2)(ii). Since the Charter Regulations were amended in 2008, DART's position on this issue has remained unchanged—the operating assistance subsidy from the State Fair is not payment for the increased service frequency and span of service during the State Fair, but rather a fixed Route #1 operating subsidy in order to support year-round transit service to Des Moines' east side, including the State Fair grounds.

The following points support DART's stated position:

1. Guidance issued by the FTA regarding its interpretation of 49 C.F.R. Part 604.3(c)(2)(ii); and
2. The nature of the Job Access and Reverse Commute ("JARC") Program and similar FTA programs.

DART's examples and explanations with regard to the foregoing are set forth in order below:

1. Guidance issued by the FTA regarding its interpretation of 49 C.F.R. Part 604.3(c)(2)(ii).

DART has received directly from the FTA and through its research in connection with its provision of transit services to the State Fair various guidance that, to DART, indicates the operating assistance subsidy from the State Fair is not likely to be viewed by the FTA as payment in part for the transit service during the State Fair. Specifically, to this point, Ms. Presutti submitted the following similar, but unrelated, inquiry back on January 3, 2012:

I have received a request to provide service for a downtown shuttle that would only operate on certain event days during the year to service the new convention center. In reviewing the charter rules, I have the following question:

1. Based on the charter definition below under (c)(2) – does it mean that we can provide irregular service for to the public for events if we DO NOT CHARGE PREMIUM or if we DO NOT HAVE A THIRD PARTY PAY FOR THE SERVICE? (Such

as a service that would only operate on days that there was a convention and was free.)

2. If the above is yes, would one of our member governments be considered a "Third party"?

(c) "Charter service" means, but does not include demand response service to individuals:

(1) Transportation provided by a recipient at the request of a third party for the exclusive use of a bus or van for a negotiated price. The following features may be characteristic of charter service:

- (i) A third party pays the transit provider a negotiated price for the group;
- (ii) Any fares charged to individual members of the group are collected by a third party;
- (iii) The service is not part of the transit provider's regularly scheduled service, or is offered for a limited period of time; or
- (iv) A third party determines the origin and destination of the trip as well as scheduling; or

(2) Transportation provided by a recipient to the public for events or functions that occur on an irregular basis or for a limited duration and:

- (i) A premium fare is charged that is greater than the usual or customary fixed route fare; or
- (ii) The service is paid for in whole or in part by a third party.

Any help on this would be much appreciated. Let me know if you need any clarification to the questions above.

Best regards,

Elizabeth

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On January 10, 2012, Ms. Presutti received the following response from the FTA:

Dear Ms. Presutti:

Please see the below response in answer to your Charter question. My contact information is provided below if you have any additional questions.

Thank you for your inquiry. You appropriately quote the definition of charter service from 49 C.F.R. Part 604 and hone in on the second prong of the definition as applying to irregular or event service: "Transportation provided by a recipient to the public for events or functions that occur on an irregular basis or for a limited duration and: (i) A premium fare is charged that is greater than the usual or customary fixed route fare; or (ii) The service is paid for in whole or in part by a third party."

If there is no premium fare charged and no third party pays for the service, then the irregular service or event service is not considered charter service under FTA's charter service regulations. Local transit agencies may provide genuinely free service, meaning no subsidy from any party, to the public.

However, a specific payment for irregular service by a governmental body to DART may be payment by a third party if that governmental body specifically requests the special service and then funds it. This is in contrast to DART responding to market need and having an ongoing service contract or agreement with other cities, the county or other regional governmental entities under which DART provides regular public transportation, some of which service may occur on an irregular basis. *Therefore, if your member government provides funds specifically so that DART can provide service to an event at the new convention center, that would be considered payment by a third party for service that is for an event or functions that occur on an irregular basis and the service would be charter service.*

Kathy Breeden
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Although the above-referenced questions and factual background posed by Ms. Presutti are not directly analogous to the facts and circumstances surrounding DART's arrangement with the State Fair, the FTA's response is significant. DART's interpretation of the FTA's response is that in order to constitute payment by a third party for service under 49 C.F.R. Part 604.3(c)(2)(ii), the third party must provide funds *specifically* so that DART can provide the service. When analyzing DART's arrangement with the State Fair, there is no indication in the Operating Assistance Contract that the State Fair is specifically providing the operating subsidy for fixed Route #1 in exchange for DART providing transit services during the State Fair. To the contrary, the Operating Assistance Contract provides that the payment from the State Fair to DART shall be an amount equal to "15% of the operating cost for Route #1," which evidences the State Fair's commitment to supporting Route #1 on a year round and year-to-year basis.

During the course of its research and review of the FTA's published guidance on the Charter Regulations and 49 C.F.R. Part 604.3(c)(2)(ii) in particular, DART reviewed an Advisory Opinion regarding an arrangement for park-and-ride service provided by Foothill Transit to the Hollywood Bowl. *See FTA Advisory Opinion 08-05 (April 25, 2008)*. The Hollywood Bowl is a popular summertime music venue. Los

Angeles County, a member of the Foothill Transit authority, specifically provided a portion of its subsidy contribution so that public transit service would be provided by Foothill Transit to the Hollywood Bowl in an effort to limit onsite parking and pollution and improve concert ambiance. See *Id.* The FTA declared that "generally, a third party that contributes to the operating assistance of a transit authority does not fall within the definition of charter service because the third party is not subsidizing particular service to an event or function." See *Id.* Since Foothill Transit admitted that Los Angeles County specifically subsidized service to the Hollywood Bowl, the FTA concluded that the Hollywood Bowl service constituted charter service. See *Id.* Foothill Transit's service to the Hollywood Bowl is distinguishable from the operating assistance subsidy paid by the State Fair to DART for operation of fixed Route #1 and DART's year round transit service to the State Fair grounds.

Additional guidance from the FTA supporting DART's position is contained in FTA Advisory Opinion 08-14 (July 10, 2008). In this case, City Bus submitted a request for an advisory opinion because it intended to provide shuttle service, for the general public, to and from a local festival. The fare charged to passengers was not a premium fare, and the festival organizers planned to advertise on City Bus' vehicles for two months prior to the festival. See *FTA Advisory Opinion 08-14 (July 10, 2008)*. When analyzing 49 C.F.R. Part 604.3(c)(2)(ii), the FTA opined that "[i]f the advertising is just for the local festival, then it is clear that the service would meet the definition of charter under paragraph two. If the advertising is to occur throughout the year and on more buses than those that shuttle the event-goers, then the payment may not be considered a subsidy because it would be payment for advertising that occurs year round." See *Id.* The import of the FTA's opinion is clear—a long-term, year-round financial arrangement, similar to the one between DART and the State Fair, is less likely to be determined a payment specifically in exchange for the transit service than a short-term financial arrangement such as the one between City Bus and the local festival.

The FTA guidance relating to 49 C.F.R. Part 604.3(c)(2)(ii) clearly indicates that the arrangement between DART and the State Fair does not constitute charter service because the operating assistance subsidy is not provided specifically for DART providing transit service during the State Fair.

2. The Job Access and Reverse Commute ("JARC") Program and similar FTA programs.

Many of the federal government's grant programs require a local match component prior to awarding a particular grant to a recipient. The FTA's grant programs are no different—an example of this is the Job Access and Reverse Commute ("JARC") Program. FTA Circular C 9050.1 (the "JARC Circular") provides guidance and application instructions for the JARC program. The JARC Circular provides:

The local share of eligible capital and planning costs shall be no less than 20 percent of the net cost of the activity, and the local share for eligible operating costs shall be no less than 50 percent of the net operating costs. All of the local share must be provided from sources other than Federal DOT funds. Some examples of sources of local match which may be used for any or all of the local share include: State or local appropriations; other non-DOT Federal funds; dedicated tax revenues; *privote donotions*; revenue from human service contracts; toll revenue credits; and net income generated from advertising and concessions. Non-cash share such as donations, volunteered services, or in-kind contributions is eligible to be counted toward the local match as long as the value of each is documented and supported, represents a cost which would otherwise be eligible under the program, and is included in the net project costs in the project budget. [*Emphosis odded.*]

As with many transit authorities, a significant amount of DART's capital and operating budgets are derived from federal grants, such as JARC and other similar programs. Accordingly, many transit authorities, including DART, rely heavily upon private donations and generous investments from community partners as an important source of local share dollars.

Transit authorities would be profoundly restricted in their ability to secure necessary funding, however, if private donations or other investments from community partners in support of regular fixed route service, like the operating assistance subsidy from the State Fair to DART, are deemed a violation of the Charter Regulations anytime a transit authority provides any kind of irregular or limited duration services in response to spikes in demand for service. DART believes the detrimental impact on the capital and operating budgets of transit authorities would be far-reaching and unwarranted. It is DART's position that the Charter Regulations are not meant to have such seemingly unintended consequences on transit authority funding.

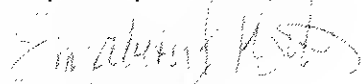
In sum, DART believes a tremendous amount of the FTA guidance relating to 49 C.F.R. Part 604.3(c)(2)(ii) supports a determination by the FTA that DART is not providing charter services in connection with its fixed Route #1 service to the State Fair. Further, DART believes a determination to the contrary regarding such service by the FTA could create unintended consequences upon the budgets of transit authorities across the country. Simply stated, DART believes such a result would be contrary to the public interest.

CONCLUSION

For the foregoing reasons, DART opposes the Request and respectfully asks the Chief Counsel to promptly deny the Request. Further, DART respectfully asks the Chief Counsel to issue an advisory opinion that DART is not providing charter service in connection with its fixed Route #1 service to the State Fair and allow DART to proceed with its plan to provide transit services from park-and-ride lots to the State Fair beginning, Thursday, August 8, 2013.

On behalf of DART, I affirm that the information included in this Response is accurate and relevant to the best of my knowledge.

Respectfully submitted,



Elizabeth Presutti

DART General Manager

Exhibit A

DART's Inquiry
Originally submitted to the FTA: July 9, 2013

Dear Ombudsman for Charter Services,

Good afternoon. I write to request an opinion from your office regarding possible service by the Des Moines Area Regional Transit Authority (DART).

- **What:** DART would improve service frequency and span of service on an established fixed route for approximately 11 days annually to accommodate a regularly scheduled event that causes a reoccurring spike in demand for service.
- **Who:** There is a large entertainment and events venue along the aforementioned fixed route that attracts thousands of visitors year-round, including the aforementioned annual event that draws hundreds of thousands of visitors from around the state and country.
- **Why:** The improved frequency is needed during this annual event to meet the temporarily increased demands and capacity needs. As a result, the service would reduce traffic congestion around the venue and allow for needed and improved service for DART Customers.
- **How:** Frequency of service would be temporarily increased on the established fixed route to meet the temporary spike in demand. Additionally, the standard fixed route would be extended during this period in order to reach a large park-and-ride location approximately 3 miles beyond where the service regularly terminates; the extension would remain inside DART's service area, which is defined as Polk County. Given that the event venue is at the midpoint of the route, the improved service frequency is focused from either end point of the route to the venue. Not all of the service runs from end to end.
- **Fare Payment:** DART will charge its regular fare or less for the service.

DART has and will to continue to enter into an operating assistance contract with the venue which provides DART an annual operating subsidy for the aforementioned fixed route to assist with maintaining service to the venue on a year round basis. DART would not receive additional dollars to offset the increase in service during the event.

Your response to our service scenario is much appreciated.

Best regards,

Elizabeth

Elizabeth Presutti, AICP
General Manager
DART - Des Moines Area Regional Transit Authority
620 Cherry Street
Des Moines, Iowa 50309
515.283.8115 Voice
515.283.8135 Fax
515.343.4921 Cell
www.ridedart.com

Exhibit B

The Operating Assistance Contract
Originally submitted to the FTA: June 19, 2013

**CONTRACT BETWEEN THE
THE DES MOINES AREA REGIONAL TRANSIT AUTHORITY
AND
THE STATE OF IOWA, IOWA STATE FAIR
REGARDING PROVISION OF OPERATING ASSISTANCE FOR DART SERVICES**

SERVICES CONTRACT

THIS SERVICES CONTRACT (the "Contract") is made and entered into as of August 1, 2012, by and between the State of Iowa, Iowa State Fair (hereinafter "the State") and the Des Moines Area Regional Transit Authority (hereinafter "DART").

RECITALS

WHEREAS, DART operates and provides, public transit service within the Des Moines region thereby reducing vehicular traffic on the surrounding roadways; and

WHEREAS, the State desires to make available modern, efficient and convenient transportation sufficient to meet the need of its patrons and employees.

NOW, THEREFORE, good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and in further consideration of the covenants and representations contained herein, the parties agree as follows:

CONTRACT

1. INCORPORATION OF EXHIBITS.

The following Exhibit is attached to this Contract and is incorporated into and made a part of this Contract by reference:

Exhibit A: DART Services to the Iowa State Fairgrounds

Each reference to this Contract shall be deemed to include all Exhibits. Any conflict between language in an Exhibit or Appendix and language in the main body of this Contract shall be resolved in favor of the main body of this Contract.

2. DESCRIPTION OF WORK.

DART, in consultation with the State, shall establish appropriate levels of service on DART fixed route bus services that service the Iowa State Fairgrounds. Service levels may need to be increased in order to service changes in demand at certain times of the year. DART reserves the right to evaluate and modify or terminate the service in accordance with adopted DART Financial and Service Policies, as those policies may be amended from time to time. The proposed service schedule is attached as Exhibit A.

3. COMPENSATION.

The State shall be obligated to pay 15 percent of the operating cost of Route #1. For the FY 2012 calendar year this cost is estimated at \$123,950. The State shall pay DART this amount by October 15th of each contract year. Any adjustments to the mutually agreed-upon compensation will be negotiated and agreed upon in writing by the parties prior to credit or payment.

4. INVOICES.

DART shall submit an invoice to the State on September 1st, unless otherwise agreed to by the parties. The State shall remit payment to DART by the date outlined in Section 3 of this contract. The State shall remit all payments to:

Des Moines Regional Transit Authority
Attn: Accounts Receivable
1100 DART Way
Des Moines, Iowa 50309

5. PRESENCE ON IOWA STATE FAIRGROUNDS PREMISES.

In consideration of Iowa State Fairgrounds permitting DART to operate the public routes on and across property owned by the State, DART agrees that:

- S.1 All persons working for or on behalf of DART whose duties bring them upon the State premises shall obey all reasonable policies, rules, and regulations that are established by the State, provided the State notifies DART of such policies, rules and regulations, and shall comply with the reasonable directions of the State Officials, but nothing herein shall be deemed to be in conflict with DART's exclusive control over the schedules, routes and types of equipment used on the routes;

6. SERVICE QUALITY.

The parties agree that the objective of the service to the Iowa State Fairgrounds is to operate in a manner that (i) is safe, reliable, efficient and effective and (ii) maximizes potential ridership. To ensure quality service and to promote effective communications, the parties will meet at regular intervals, as agreed to upon by the parties.

7. TERMINATION.

- 7.1 Term. This Contract is for one (1) year, effective August 1, 2012 (the "effective date") and shall remain in effect until July 31, 2013, subject to the annual evaluation of the costs of the service and the annual appropriation of funds for the service by the Iowa State Fairgrounds.
- 7.2 Termination for Convenience. Either party may terminate this Contract at any time without cause upon sixty (60) days written notice to the other party. In case of termination for convenience by the State, the parties shall negotiate an equitable settlement of termination costs. If the State elects to terminate its subsidy with respect to any portion of the service provided under this Contract on at least (30) days written notice, and this Contract shall terminate for convenience as to such service at the end of that period.
- 7.3 Termination for Default. By written notice DART may terminate this Contract for default in the event the State fails to pay an overdue invoice within thirty (30) days after receiving written notice from DART that: (i) such invoice is overdue, and (ii) DART intends to exercise its right to terminate this Contract pursuant to this Section in the event it is not paid within said thirty (30) day period. DART may exercise the option to resume service upon such terms and conditions as the parties may agree in writing. DART shall not be obligated to resume service after a termination for default of this Contract. DART may resume service only to the extent that the resumption of service is consistent with the DART Financial and Service Policies, as those policies may be amended.
- 7.4 No Effect on Taxes, Fees, Charges or Reports. Termination of this Contract shall not relieve the Company of the obligation to pay any fees, taxes or other charges then due to DART; to file any daily, monthly, quarterly or annual reports; or relieve the Company from any claim for damages previously accrued or then accruing against the Company.
- 7.5 Authority to Terminate. The following person is authorized to terminate this Contract on behalf of the DART: the General Manager or designee.

8. INDEMNIFICATION.

To the fullest extent permitted by law, the State shall indemnify, defend and hold harmless each of the "Indemnitees" (as defined below) from and against any and all "Charges" (as defined below) paid or incurred by any of them as a result of any claims, demands, lawsuits, actions, or proceedings arising from any act of negligence or willful misconduct by the State or any of its agents, employees or subcontractors relating to this Contract, including but not limited to any liability caused by an accident or other occurrence resulting in bodily injury, death, sickness or disease to any person(s) or damage or destruction to any property, real or personal, tangible or intangible. For purposes of this Section: (a) the term "Indemnitees" means DART and each of the DART officers, officials, employees, agents and independent contractors (excluding the State); and (b) the term "Charges" means any and all losses, damages, costs, expenses (including reasonable attorneys' fees), obligations, duties, fines, penalties, royalties, interest charges and other liabilities (including settlement amounts).

Additionally, to the extent allowed by law, DART shall defend, indemnify and hold harmless the State and its trustees, officers, employees and agents from any claim, injury, damage, expense or loss to the extent that it arises from DART's negligence or willful misconduct, provided that the State shall promptly notify DART of any claim or action brought which may result in a claim for indemnification under this Section.

9. NOTICES AND PRINCIPAL CONTACTS.

Any notice, consent or other communication required or contemplated by this Contract shall be in writing, and shall be delivered in person, by U.S. mail, by overnight courier, by electronic mail or by telefax to the intended recipient at the address set forth below:

Mr. Jim Tishim	
Planning Director	
Des Moines Area Regional Transit Authority	
1100 Dart Way	
Des Moines, Iowa 50309	
Telephone: 515.283.8106	
Fax: 515.283.8135	
Email: jtishim@ridedart.com	

Notice shall be effective upon the date of receipt by the intended recipient; provided that any notice that is sent by telefax or electronic mail shall also be simultaneously sent by mail deposited with the U.S. Postal Service or by overnight courier. Each party may change its address for notification purposes by giving the other party written notice of the new address and the date upon which it shall become effective.

10. MISCELLANEOUS.

- 10.1. Entire Contract. This Contract is the entire agreement between the parties with respect to its subject matter, and there are no other representations, understandings, or agreements between the parties with respect to such subject matter. This Contract supersedes all prior agreements, negotiations, representations and proposals, written or oral.
- 10.2. Amendment. No amendment or change to this Contract shall be valid unless in writing and signed by both parties to this Contract.
- 10.3. Binding Nature and Assignment. This Contract shall bind the parties and their successors and permitted assigns. Neither party may assign this Contract without the prior written consent of the other. Any assignment attempted without the written consent of the other party shall be void.

- 10.4. DART Not Liable for Special or Consequential Damages. DART shall not be liable to the State, its agents, or representatives or any subcontractor for or on account of any stoppages or delay in the performance of any obligations of DART, or any other consequential, indirect or special damages or lost profits related to this Contract.
- 10.5. Severability. The invalidity of one or more of the phrases, sentences, clauses or sections contained in this Contract shall not affect the validity of the remaining portion of the Contract so long as the material purposes of the Contract can be determined and effectuated. If any provision of this Contract is held to be unenforceable, then both parties shall be relieved of all obligations arising under such provision, but only to the extent that such provision is unenforceable, and this Contract shall be deemed amended by modifying such provision to the extent necessary to make it enforceable while preserving its intent.
- 10.6. No Publicity. No advertising, sales promotion or other materials of the State or its agents or representations may identify or reference this Contract or DART in any manner absent the written consent of DART.
- 10.7. Reports. DART and/or its contractor shall maintain service-related records, including ridership numbers, in such formats as the parties may agree. Such records shall be available to the State for examination and inspection upon request or according to any scheduled reporting periods to which the parties may agree.
- 10.8. Approvals. All approvals or consents required under this Contract must be in writing.
- 10.9. Waiver. No waiver of any provision of this Contract shall be effective unless in writing and signed by the party waiving the rights. No delay or omission by either party to exercise any right or remedy it has under this Contract shall impair or be construed as a waiver of such right or remedy. A waiver by either party of any covenant or breach of this Contract shall not constitute or operate as a waiver of any succeeding breach of that covenant or of any other covenant.
- 10.10. Survival of Provisions. All provisions of this Contract which by their nature and effect are required to be observed, kept or performed after termination of this Contract shall survive the termination of this Contract and remain binding thereafter, including but not limited to the following
- | | |
|-------------|-------------------------------------------------|
| Section 7 | "Termination" |
| Section 8.4 | "No Effect on Taxes, Fees, Charges, or Reports" |
| Section 9 | "Indemnification" |
| Section 10 | "Notices" |
| Section 11 | "Miscellaneous" |
- 10.11. Familiarity and Compliance with Laws and Ordinances. The State agrees to make itself aware of and comply with all local, state and federal ordinances, statutes, laws, rules and regulations applicable to the Work. The State further agrees that it will at all times during the term of this Contract be in compliance with all applicable federal, state and/or local laws regarding employment practices. Such laws will include, but shall not be limited to workers' compensation, the Fair Labor Standards Act (FLSA), the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA) and all OSHA regulations applicable to the work.
- 10.12. Construction of Terms. Each of the parties has agreed to the use of the particular language of the provisions of this Contract and any questions of doubtful interpretation shall not be resolved by any rule or interpretation against the drafters, but rather in accordance with the fair meaning thereof, having due regard to the benefits and rights intended to be conferred upon the parties hereto and the limitations and restrictions upon such rights and benefits intended to be provided.

10.13. Relationship of the Parties. The relationship of the parties established by this Contract is solely that of independent contractors. Nothing contained in this Contract shall be construed to (i) give any party the power to direct or control the day-to-day administrative activities of the other; or (ii) constitute such parties as partners, co-owners or otherwise as participants in a joint venture. Neither party nor its agents or employees is the representative of the other for any purpose, and neither party has power or authority to act for, bind, or otherwise create or assume any obligation on behalf of the other.

IN WITNESS WHEREOF, and in acknowledgment that the parties hereto have read and understood each and every provision hereof, the parties have caused this Contract to be executed on the date first written above.

ATTESTED:

**The State of Iowa
Iowa State Fair**

BY: _____

BY: _____

TITLE: _____

TITLE: _____

ATTESTED:

DART:

BY: _____

BY: _____

FY 2013 SERVICE SCHEDULE

[illegible]